FILED
OCT 21 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942

No. 471

SEARS, ROEBUCK AND CO., a corporation,

Petitioner,

vs.

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

RAYMOND G. STANBURY,
1211 Pacific National Building, Los Angeles, Calif.
Counsel for Petitioner.

PARKER & STANBURY,
HARRY D. PARKER,
VERNON W. HUNT,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit 1

Statement of the matter involved 2

The Supreme Court has jurisdiction to review, on certiorari, action of the Circuit Court of Appeals in directing remand of this cause to the state court 3

Question presented for determination 4

Reasons relied upon for the allowance of the writ 4

Prayer for the issuance of the writ 5

Brief in Support of Petition for Writ of Certiorari 7

The opinion of the court below 7

Basis of jurisdiction 7

Statement of the case 8

Specification of errors 8

Summary of argument 9

Argument and authorities in support of petition 9

Conclusion 25

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Arizona v. Clark, 235 U. S. 669	20
Bailey v. Texas Co., 47 Fed. (2d) 153	19
Carpenter v. Baltimore, 109 Fed. (2d) 375	20
Fidelity & Deposit Co. of Maryland v. Burden, 53 Fed. (2d) 381	18
Fienup v. Kleinman, 5 Fed. (2d) 137	15
General Investment Company v. Lake Shore, 250 Fed. 160	20
Gray v. Ruff, 292 U. S. 25, 54 S. Ct 608, 78 L Ed. 1099	3, 8
Handley-Mack Co. v. Godchaux Sugar Co., 2 Fed. (2d) 435	16
Jacobson v. Chicago, 66 Fed. (2d) 688	20
Kreigh v. Westinghouse, 214 U. S. 249	20
Lopata v. Handler, 121 Fed. (2d) 938	5, 14, 20, 21
Mackay v. Uinta Co., 229 U. S. 173	10, 11
Mellon v. International, 32 Fed. (2d) 390	20
Moore, In re, 209 U. S. 490	20, 23
Shamrock Oil and Gas Corp. v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868	5, 20, 21, 23, 24
Western Loan Company v. Butte, 210 U. S. 368	20

STATUTES.

Judicial Code, Sec. 24 (28 U. S. C. A., Sec 41)	22, 23
Judicial Code, Sec. 28 (28 U. S. C. A., Sec 71)	22, 23
Judicial Code, Sec. 240 (28 U. S. C. A., Sec. 347)	3, 8

IN THE

Supreme Court of the United States

October Term, 1942

No. .....

SEARS, ROEBUCK AND CO., a corporation,

Petitioner,

vs.

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

Sears, Roebuck and Co., a corporation, petitioner herein, prays that a writ of certiorari issue to review the judgment entered September 12, 1942, in the United States Circuit Court of Appeals for the Ninth Circuit, in case No. 10058, entitled, "Lillian M. Hoyt and Ezra H. Hoyt, Jr., Appellants, vs. Sears, Roebuck and Co., a corporation, Appellee," and respectfully shows to this Honorable Court:

Statement of the Matter Involved.

Petitioner, Sears, Roebuck and Co., a New York corporation, commenced an action in the California state court, seeking to recover from respondents, Lillian M. Hoyt and Ezra H. Hoyt, Jr., both California residents, the sum of $6150.00. After the respondents had filed an answer and a cross-complaint, seeking to recover a sum of money in excess of the jurisdictional sum of $3000.00, petitioner sought and obtained removal of this cause to the United States District Court, upon the grounds that there was diversity of citizenship and that the amount prayed for in the cross-complaint was in excess of the jurisdictional sum of $3000.00. [Record, pp. 2 to 32.] The respondents made no objection to removal of the cause from the state court to the United States District Court, nor did they ever make a motion to remand the cause to the state court. Furthermore, the respondents did not at any time thereafter make any objection to any of the proceedings in the United States District Court. The respondents proceeded to trial in the United States District Court without making any objection whatsoever, and they did not even make any contention as to jurisdiction of the court when they moved for a new trial. Said contention was made for the first time on appeal. [Record, p. 170.] Trial was had in the United States District Court, and judgment was rendered in favor of petitioner. [Record, pp. 49 to 52.] On appeal from said judgment, the United States Circuit Court of Appeals for the Ninth Circuit reversed said judgment, with instructions to remand the cause to the state court, upon the ground that the United States District Court did not have jurisdiction of the cause. [Record, pp. 174 to 179.]

The Supreme Court Has Jurisdiction to Review, on Certiorari, Action of the Circuit Court of Appeals in Directing Remand of This Cause to the State Court.

The judgment of the Circuit Court of Appeals to be reviewed was filed and entered September 12, 1942. [See Record, p. 178.] No petition for rehearing in that court was filed. This petition for writ of certiorari is filed within three months after the filing of the judgment of the Circuit Court of Appeals.

In the Circuit Court of Appeals, petitioner claimed that the United States District Court had jurisdiction of this cause, and that any irregularity in connection with removal of this cause from the state court to the United States District Court could be and was waived by failure of the opposing parties to object to removal of the case from the state court, their failure to move to remand the case to the state court, and their failure to make any objection whatsoever until the case had reached the Circuit Court of Appeals. [See Record, p. 175.] The Circuit Court of Appeals held that the United States District Court did not have jurisdiction over this cause, and reversed the judgment, with instructions to remand to the state court. [Record, pp. 174 to 179.]

The jurisdiction of this court is invoked under section 240 of the Judicial Code, 28 U. S. C. A., section 347.

This court may review on certiorari action of the Circuit Court of Appeals in directing remand of a cause to the state court.

Gray v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099.

Question Presented for Determination.

The question for determination in this case is:

Where an action which is within the original jurisdiction of a United States District Court and could have been commenced originally in that court, being an action entirely between citizens of different states and for a sum in excess of the jurisdictional amount, is commenced in a state court and is removed therefrom to the United States District Court without objection, and thereafter no motion to remand is ever made, and no objection to any irregularity in connection with the removal is ever made until the case reaches the United States Circuit Court of Appeals, does the irregularity in the removal proceeding constitute a jurisdictional defect, or is it merely a defect which could be, and was, waived by failure to move to remand the case to the state court?

Reasons Relied Upon for the Allowance of the Writ.

It is respectfully submitted by petitioner and relied upon as reasons for the granting of the writ that:

(1) The question of law involved is of such fundamental and widespread importance that it should be settled and determined by this court at this time.

(2) The decision handed down by the Circuit Court of Appeals, in holding that the United States District Court did not have jurisdiction of this cause, results in lack of uniformity of decisions. There is a square conflict between the decision of the Ninth Circuit of the

United States Circuit Court of Appeals in the case at bar and that of the Tenth Circuit of the same court in *Lopata v. Handler,* 121 Fed. (2d) 938, both rendered subsequent to the decision of this court in *Shamrock Oil and Gas Corp. v. Sheets,* 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868. In the *Lopata* case it is held that the provisions of the same sentence of the removal statute here held to be non-waivable may be waived.

(3) The decision rendered by the Circuit Court of Appeals in this case is contrary to previously established law, and should not be permitted to stand.

(4) This case presents a fundamental question of law upon which no diversity of opinion in the several Circuit Courts of Appeals should be permitted to exist.

Prayer for the Issuance of the Writ.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, directing said court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 10058, Lillian M. Hoyt and Ezra H. Hoyt, Jr., Appellants, vs. Sears, Roebuck and Co., a corporation, Appellee," and that the judgment of said court therein be reversed by this Honorable Court, and that your petitioner may have such

other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated this 19th day of October, 1942.

SEARS, ROEBUCK AND CO.,
a Corporation, Petitioner,

By RAYMOND G. STANBURY,
Counsel for Petitioner.

PARKER & STANBURY,
HARRY D. PARKER,
VERNON W. HUNT,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition is in my judgment well founded, and that the said petition is not interposed for delay.

Dated this 19th day of October, 1942.

RAYMOND G. STANBURY,
Counsel for Petitioner.